Supreme Court, U.S.
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Nos. 85-1892, 85-1901, 85-1902, 85-1949

In The

Supreme Court of the United States

OCTOBER TERM, 1986

RENE PICCARRETO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER, RENE PICCARRETO

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SUPPLEMENTAL BRIEF
FOR THE PETITIONER,
RENE PICCARRETO

The first and second questions presented in this petition concern the validity of traditional 'double jeopardy' analysis when applied to successive RICO prosecutions.

In 1976 the petitioner was indicted for being a member of an enterprise, i.e. the "Rochester mob". The underlying predicate acts in the 1976 indictment included several arsons that were allegedly part of an insurance fraud scheme. As set forth in the petition, a person named Massaro was a prime mover in this scheme. Later, Massaro was murdered. The two informants who provided the information on this alleged scheme also provided information as to the causes and participants in the murder of Massaro. These two claimed that the same enterprise that ran the insurance/fraud scheme ordered the killing of Massaro because he was talking about the insurance/fraud scheme. It was also alleged that the petitioner was involved. For reasons known only to the authorities, the Massaro murder was not included as a predicate act in the 1976 RICO indictment.

The petitioner was tried and acquitted on the 1976 indictment.

In 1982, the petitioner was charged with a second RICO indictment. Most of the underlying predicate acts in the indictment involved new charges (post 1978) concerning the alleged competition between rival forces for control of the illegal gambling business in the Rochester area. However, also included as an underlying predicate act, was the 1973 murder of the aforementioned Massaro.

The petitioner sought to have this part of the 1982 indictment expunged on grounds of double jeopardy. The petitioner argued

that the second prosecution should have been barred from using the Massaro homicide as a predicate act since the government knew of the allegations at the time of the return of the 1976 indictment. Since the charges could have been included in the 1976 RICO indictment, but weren't, the acquittal on the 1976 RICO should have acted as a bar to that part of the 1982 indictment which included any predicate acts that were known to the government at that time and were related to the affairs of the enterprise. This rule would prevent the government from 'holding back' predicate acts, so as to bring multiple RICO charges against a defendant who is acquitted after trial on the first indictment (see petition).

In an interlocutory opinion, *United States v. Russotti,* 717 F.2d 27 (CA2 1983), the Second Circuit rejected the defense argument and held that the 1982 RICO indictment presented no double jeopardy problems for the prosecution. The basis for the rejection was the court's acceptance of the government's representation, without the benefit of a hearing, that two separate schemes were involved: one, the insurance/fraud scheme; and the other, the gambling club/extortion scheme. The government stated that the **"two schemes were totally unrelated, and therefore, the government could not have included the charges in the first indictment even if they wanted to."** The Court accepted this argument but issued a warning:

> "we are not insensitive to the appellants' concern that the government may be free to pursue successive prosecutions under RICO by merely alleging two predicate acts . . . and, by holding in reserve other predicate acts, bring future RICO prosecutions against participants in the same enterprise . . . However, the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its extortion scheme — **a scheme which had no relationship to the 1976 arson-for-hire activity."** *Russotti,* supra at 34.

In other words, the court construed the pattern requirement of RICO in a conservative fashion. Although the predicate acts were committed by the same enterprise and were related to the affairs of that enterprise, the court held that the acts were not related enough to have included them in the same RICO indictment.

The purpose of this supplemental brief is to bring to this Court's attention a recent Second Circuit case that contradicts the *Russotti* holding. In *United States v. Ianniello,* 808 F.2d 184 (CA2 Dec. 1986), the Second Circuit held that the RICO pattern element does not require anything more than two racketeering acts. The acts need not be related by a common scheme and need not involve more than one transaction, id. at 190-192. In so holding, the court reaffirmed the theory set forth in *United States v. Weisman,* 624 F.2d 1118 (CA2 1980) that any concern for relatedness and continuity is supplied by the enterprise element and the nexus of the racketeering acts to the enterprise: "we hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied." *Ianniello,* supra at 192.

CONCLUSION

Clearly, the 1973 Massaro homicide could have been included in the 1976 RICO indictment. If this is true then the court's rationale for its interlocutory holding is fatally flawed. When the government is aware of underlying predicate acts, it has the choice of picking and choosing which acts to include. Once the choice is made, however, the government may not then bring successive RICO prosecutions following an acquittal, based on acts

that could have been included in the first indictment. To do so violates the Fifth Amendment principles of double jeopardy and fundamental fairness.

The holding in *Ianniello* contradicts the rationale of the interlocutory holding in *Rossotti.* In addition, footnote 14 in the *Sedima* opinion (*Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 US-, 87 L.Ed. 2d 346, 358, 105 S.Ct. - (1985)) leaves the law concerning a RICO 'pattern of racketeering activities' unclear. Because of the expected continuation of RICO indictments, the petition for a writ of certiorari should be granted to provide guidance to the trial courts on the 'pattern' requirements of RICO and to correct the violation of Fifth Amendment rights suffered by this petitioner.

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Respectfully submitted,

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